No. 11023

In the United States Circuit Court of Appeals for the Ninth Circuit

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

PATRICK LUMBER COMPANY (A CORPORATION), APPELLEE

PETITION FOR REHEARING

GEORGE MONCHARSH,
Deputy Administrator for Enforcement.
DAVID LONDON,
Acting Director, Litigation Division,
Office of Price Administration, Washington, D. C.
HERBERT H. BENT,
Regional Litigation Attorney,
San Francisco, California.

SAMUEL MERMIN,
Special Appellate Attorney,
Washington, D. C.,
Of Counsel.

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Now comes Chester Bowles, Administrator of the Office of Price Administration, appellant in the above-entitled proceeding and petitions this Court, pursuant to Rule 25, for rehearing of its judgment rendered on October 5, 1945 in the following *per curiam* opinion:

> The Price Administrator appeals from an adverse judgment in a suit for damages for sales of Douglas fir dimension lumber at prices allegedly in excess of the maximum contemplated by Revised Maximum Price Regulation 26.
>
> The question on the appeal concerns the interpretation of the Regulation. The Trial Court found that the prices charged were not in excess of the maximum prescribed in Table 2, Section 23 of the Regulation, which table appellees had thought applicable to the transaction. The Administrator claims that this table fixed no price for the dimensions sold

> and that accordingly Section 12 of the Regulation came into play. This section provides that "if a seller wishes to sell a grade which is not specifically priced in the Price Tables or wishes to make an addition for special workings, specifications, services, or other extras for which additions are not specifically permitted," he must apply for a maximum price.
>
> We are not disposed to disturb the determination below that Table 2 was applicable to the peculiar facts of the case. As the court observed, the question involved is a technical one in the industry. There was substantial evidence to support the finding made.
>
> Affirmed.

The opinion states that the Court is unwilling to disturb the determination of Judge McCulloch that Table 2 of Revised Maximum Price Regulation 26 did not apply to the lumber sales in question, since there was "substantial evidence" to support the "finding." This view should be reconsidered by the Court, we submit, since the assumption that the construction and application of an administrative regulation having the force of law are questions of fact, the determination of which by the trial judge is not reviewable by the Circuit Court if based on substantial evidence, is demonstrably erroneous.

1. The process of determining whether a statute or administrative regulation "applies" to particular transactions may conveniently be considered as consisting of 3 major steps: (a) Determining the *specific facts* as to the transactions involved (e. g. in this case, what sizes and types lumber were sold, at what

prices, etc.). (b) Determining the *legal requirements* which are established by the governing statute or regulation (in this case, what rules as to maximum prices of lumber are established by Revised Maximum Price Regulation 26, in Table II and Section 12). (c) Determining *the relations between* (*a*) *and* (*b*) (in this case, which, if any, of the legal rules in Table 2 and Section 12 establish maximum prices for the lumber sold).

In this suit, the *fact-finding* involved in the step designated above as "(a)" is *not in issue* at all. It was undisputed that the sales were of Douglas Fir dimension lumber, surfaced on one side and two edges to a thickness of 1½", and the prices actually charged were also undisputed (See Administrator's main brief, p. 13).

The controversy centers about steps "(b)" and "(c)." But the questions there involved are not questions of fact. Determining, under "b," what legal rules are established in a Regulation having the force of law is clearly the determination of a question of law. It is no less a question of law if, as under "(c)," the same process of construction is performed, but with attention paid to the relation of the legal rule to the given facts of past transactions. Such an "application" of the law to the facts is inherently similar to the supposedly "pure" process of construction in "b." The difference is that the relation to particular facts of past transactions is made *explicit* under "(c)" while it is only implicit in the determination under "b" of the intended scope of the legal requirement. And the courts have recognized that this "application"

of a statute or regulation to given facts is essentially a legal question (sometimes referred to as a "mixed question of law and fact"). As such, it is *open for independent redetermination by the Circuit Court in reviewing a district judge's determination* thereof.

Thus, in *Exmoor Country Club* v. *United States* 119 F. 2d 961 (C. C. A. 7th), where the question was whether certain amounts received by a private club were "paid for admission to any place" within the meaning of a taxing statute, the Circuit Court independently considered the issue and reversed the District Court construction, pointing out (p. 963): "In this case the facts are not in dispute. The problem is one of construction, i. e., the application of the taxing statute. In such situations, where the ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact, it is subject to judicial review, and on such review the appellate court may substitute its judgment for that of the trial court. *Bogardus* v. *Commissioner* 302 U. S. 34, 39, 58 S. Ct. 61 * * * ." To the same effect see *United States* v. *Anderson* 108 F. 2d 475, 479 (C. C. A. 7th); *Duquesne Club* v. *Bell* 127 F. 2d 363, 364–5 (C. C. A. 3rd) *cert. denied* 317 U. S. 638; O'Brien, *Manual of Federal Appellate Procedure* (3rd ed. 1941) at p. 19. This Court has followed the same rule. In *United States* v. *Armature Exchange Inc.,* 116 F. 2d 969 (C. C. A. 9th) cert. denied 313 U. S. 573, 61 S. Ct. 960, it did not hesitate to determine independently, and to reverse the District Court's conclusion on, the question of whether one who added labor and materials

to worn-out armatures was a "manufacturer or producer" of automobile parts, within the meaning of the applicable statute. Again, in *McLaughlin* v. *Hull* 87 F. 2d 641, 644 (C. C. A. 9th), this Court acknowledged the general rule that the "meaning and application" of an ordinance is a question of law upon which the court, if requested, should instruct the jury. And in *Bowles* v. *Wheeler* (C. C. A. 9th, August 1, 1945, No. 10,924) 3 O. P. A. Op. and Dec. 2216, this Court independently construed the terms of Maximum Price Regulation 165 and reversed the District Court's construction of the "class of purchaser" clause of the regulation. Other Courts (e. g. *Bowles* v. *Sisk* 144 F. 2d 163 (C. C. A. 4th); *Bowles* v. *Biberman* C. C. A. 3rd, Sept. 21, 1945) including the Supreme Court (*Bowles* v. *Seminole Rock and Sand* Co. 65 S. Ct. 1215) have similarly reversed lower court constructions of various, rather technical provisions of O. P. A. regulations without any suggestion that the issue of construction was anything other than a question of law.

Moreover the Supreme Court has recently declared that even where the Circuit Court is reviewing a statutory construction by the Tax Court (whose specialized, quasi-administrative experience has caused great weight to be given to its conclusions) the Circuit Court, though giving appropriate weight to the Tax Court conclusions, is free to redetermine the question for itself. *Bingham's Trust* v. *Commissioner of Internal Revenue,* U. S. —, 65 S. Ct. 1232 (1945). The question was whether certain legal expenses were deductible from gross income as one of the "ordinary

and necessary expenses paid or incurred during the taxable year for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income" within the meaning of the quoted statutory language. In discussing the standards for judicial review, the Court stated, through Chief Justice Stone (p. 1235): "But whether the applicable *statutes and regulations* are such as to *preclude the decision* which the Tax Court has rendered, is, as was recognized in *Dobson* v. *Commissioner,* supra, 320 U. S. 492, 493, 64 S. Ct. 242, 88 L. Ed. 248, *a question of law reviewable on appeal.*" [Italics supplied.] So too here, the question of whether the requirements of the Regulation are such as to "preclude the decision" that Table 2 applies is a "question of law reviewable on appeal."

2. These case authorities reflect some rather settled considerations of policy and history. As has been observed in a recent study, "no reason of policy and no rule or statute require that the trial court's judgment as to the application of a rule of law to the facts found be binding to any extent on the appellate court. The trial judge is neither more expert in the particular field nor more representative of the community than the appellate court; if anything, he is less so. His judgment as to the application of a rule to facts found is not likely to be superior to that of the reviewing body, which is composed of a greater number of men of at least presumably equal competence in precisely the same field."[1] And it is a historical

[1] Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis,* 58 Harv. L. Rev. (1944) 70, 113.

fact that the federal equity practice which was followed [2] in Rule 52 (a) of the Federal Rules governing Circuit Court review of judge-made findings was to give "the appellate court in equity * * * unlimited power to review the entire record, both on the law and on the facts; this, of course, included power to review issues with respect to which law and fact were intermingled. The self-imposed limitation, which was the forerunner of the 'clearly erroneous' rule [of Rule 52 (a)], merely recognized the superior position of the trial judge as to matters of credibility. The appellate courts did not curtail their reviewing power except where there was a reason for doing so—i. e., as to those matters which could best be determined by the man who heard the testimony. The predecessor to the 'clearly erroneous' rule thus applied only to findings as to *specific facts* where *testimony* might be in *conflict,* and to facts to be inferred from *oral testimony.*" [3] [Italics supplied.]

3. The Administrator's contention that the issue of the meaning and application of the Regulation is a question independently reviewable by the Circuit Court is in no way weakened by the observation of Judge McCulloch (which is noted in this Court's *per*

[2] Advisory Committee, Notes to the Rules for Civil Procedure (1938), Note to Rule 52 (a).

[3] Stern, *supra*, pp. 113–114. That the word "fact" in Rule 52 (a) is to be given this normal and natural meaning as against a broad meaning which would include the idea of "applying" the law to the facts is further corroborated by the use of the same word, in obviously the normal, restricted sense, in Rule 53 (e) (2) as to master's findings and in Rule 56 as to summary judgment (*Id.*, pp. 114–115).

curiam opinion) that the question involved is a technical, industry question. Of course, Table 2 of the Regulation in fixing maximum prices for Douglas Fir dimension lumber uses some technical terms in denoting various specifications. But all of these terms are fully defined in the Regulation; none of them harbors any ambiguity that would have to be dispelled by reference to factual testimony as to what the industry understood them to mean. In other words the pertinent, technical terms are given (by Sec. 22 and Table 2, Note 23) the meanings set forth in Standard Grading and Dressing Rules (Exhibit 2) and the American Lumber Standards (Exhibit 2). These explicit definitions incorporated in the Regulation—which are controlling on the meaning of the terms used (***Fox*** v. *Standard Oil Co.,* 294 U. S. 87, 55 S. Ct. 333)—show that the *dimension lumber referred to in Table 2* of whatever quality or surfacing, has a standard, *minimum thickness when surfaced at all, of* 1⅝″ (See Administrator's main brief, p. 15), whereas the *lumber sold here was concededly of* 1½″ *thickness* (Exhibits 3–5, R. 64–66). Thus it is apparent, from the explicit definitions in the Regulation and the conceded facts, that Table 2 was inapplicable, and no reference to any testimony on the industry understanding of the technical terms used in Table 2 was necessary. *Nor, indeed, was any offered by the defendant-appellee.* As was pointed out in our reply brief (p. 2), the only argument appellee could muster in his brief, to show the applicability of Table 2, was an attempted demonstration at some length of the irrelevant propositions

that *he in fact used* Table 2 prices and that they were "reasonable."

Thus, insofar as this Court's unwillingness to disturb the district judge's determination is based on the assumption that he had based his conclusion on evidence of industry understanding of technical terms used in Table 2, the Court has proceeded on an erroneous assumption.

4. We have thus far argued that the question of construction involved here is either a question of law or a "mixed" question which is independently reviewable by this Court, and that the review of judicial "findings of fact" provided for in Rule 52 (a) has no pertinence to this case. But even if it were *assumed that Rule 52 (a) were applicable,* this Court's *per curiam* opinion would be erroneous for the reason that it adopts a *standard of judicial review different from that embodied in Rule 52 (a).* The Court uses a "substantial evidence" rule, whereas Rule 52 (a) establishes a "clearly erroneous" standard. The latter standard gives the reviewing court far more scope. "Policy, authority, and history all * * * show that the 'clearly erroneous' rule gives the reviewing court broader powers than the 'substantial evidence' formula.'"[4] The Rule, as has previously been noted, adopted the federal equity practice, and the equity practice, as the Supreme Court has said, "did not deny power to the Circuit Court of Appeals to review facts but rather went to the weight to be accorded to the findings of a lower court and had special perti-

[4] *Id.*, p. 88.

nence where credibility of witnesses was involved.'"[5] This obviously provides a broader scope of review than the "substantial evidence" rule which is similar to the review given to the verdicts of juries.[6]

If, then (still on the assumption that Rule 52 (a) is applicable) the "clearly erroneous" standard is to be applied, it is clear that Judge McCulloch's determination would have to be held to be "clearly erroneous" under the Rule, because it constitutes a finding "induced by an erroneous view of the law" (*Aetna Life Ins. Co.* v. *Kepler* 116 F. 2d 1, 4 (C. C. A. 8th); or a "misapplication of the law" (*United States* v. *Armature Rewinding Co.* 124 F. 2d 589, 591 (C. C. A. 8th) or an "incorrect conclusion" from the evidentiary findings (*Kuhn* v. *Princess Lida of Thurn & Taxis* 119 F. 2d 704, 706, (C. C. A. 3rd).

5. It must therefore be concluded that—regardless of whether Rule 52 (a) applies—this Court is free to, and should, overrule the lower court's determination that Table 2 of the Regulation applies. The Court has not considered the applicability of *Section 12* in its opinion, but simply states that it is unwilling to disturb Judge McCulloch's "finding" that *Table 2* was applicable. Once that determination of the court below is overruled it follows necessarily, for the reasons set forth in our brief (Main brief,

[5] *District of Columbia* v. *Pace*, 320 U. S. 698, 701–02.

[6] See generally *Aetna Life Ins. Co.* v. *Kepler* 116 F. 2d 1, 4–5 (C. C. A. 8th); 3 Moore's Federal Practice § 52.01, p. 3118; Simkins, Federal Practice (3rd ed.) p. 488; Pike and Fischer, Federal Rules Service, vol. 2, Commentary, pp. 673–4.

pp. 16–25; Reply brief pp. 3–5)[7] that Section 12 of the Regulation, pursuant to which the Administrator

[7] The argument as to the meaning of Section 12 may be summarized as follows: (1) It was evident that the *industry generally* knew the Section was intended to apply to sales of lumber of substandard specifications; (2) prior to issuance of the Revised Regulation, such sales had always been subject to a section comparable to Section 12, and there is nothing to show, either in the Statement of Considerations (which lists all the substantive changes made in the earlier regulation) or otherwise, that the change in wording of Section 12 reflected a change in intent as to the special-pricing procedure, in fact the words "grade" and "addition" had been used in the earlier Regulation and construed in a manner similar to that in which the Administrator construes them in Section 12; (3) In view of the clear inapplicability of Table 2, a conclusion that Section 12 is also inapplicable would be untenable (or at least far less reasonable than the contrary construction) because (a) it would make Section 12 *inconsistent* with Section 2 which declares that "*all* Douglas fir" is priced under RMPR 26 "whether the particular *item* is specifically priced in the price tables or not"; (b) it would leave the whole field of substandard specifications completely without a ceiling price, thus encouraging sellers to sell substandard items and virtually destroying price control in the industry.

We repeat that if the appellee had doubts as to the meaning of the regulation he could have dispelled them by inquiring of the O. P. A. In *A. T. & T.* v. *United States*, 299 U. S. 232, 245, 57 S. Ct. 170, a statutory provision requiring telephone companies to make, in the course of prescribed accounting procedures, an "estimate" of certain costs, was attacked on the ground of uncertainty of the requirement. The Court through Mr. Justice Cardozo, met this objection by pointing out that the F. C. C. was available to answer inquiries about the application of this provision, and he also stated that in any event no criminal penalty would come into play if the violations were not wilful. So, too, here, the O. P. A. is available for inquiries, and (even if it be assumed, arguendo, that damages beyond the single overcharge are penal) no penal damages are recoverable under Section 205 (e) of the Act if the violation is not wilful and occurs in spite of the taking of practicable precautions.

established the prices upon which the overcharges are calculated, is applicable to the lumber sales involved.

CONCLUSION

For the foregoing reasons it is submitted that this petition for rehearing should be granted.

Respectfully submitted.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement.
DAVID LONDON,
Acting Director, Litigation Division,
Office of Price Administration,
Washington, D. C.
HERBERT H. BENT,
Regional Litigation Attorney,
San Francisco, California.
SAMUEL MERMIN,
Special Appellate Attorney,
Washington, D. C.,
Of Counsel.

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